AMERICANS WITH DISABILITIES ACT ACCESSIBILITY CLAIMS

Defending Title II: City Sidewalk Litigation

DENISE V. WILKERSON
Assistant City Attorney
City of Arlington
P.O. Box 90231
Arlington, Texas 76004
(817) 459-6878
(817) 459-6897 (facsimile)
E-mail: denise.wilkerson@arlingtontx.gov

State Bar of Texas
22nd ANNUAL
SUING AND DEFENDING GOVERNMENTAL ENTITIES COURSE
July 15-16, 2010
San Antonio

CHAPTER 12

DENISE V. WILKERSON

PRIMARY AREA OF PRACTICE

Denise Wilkerson is a Senior Assistant City Attorney for the City of Arlington, Texas. As a member of the litigation section, she is responsible for civil rights, employment and tort matters. Currently she is knee-deep in an ADA accessibility lawsuit. She has been with Arlington since 2003. Formerly, she was a felony/appellate prosecutor for the District Attorney of Galveston County and McLennan County, Texas. She is a member of the State Bar College. She has served as an instructor at the University of Texas at Arlington, Galveston College and McLennan Community College in various courses such as Business Law and LSAT test preparation. She has six fantastic children and a very patient husband, attorney Carl Wilkerson.

LICENSES & BAR ADMISSIONS

State Bar of Texas
United States District Court for the Northern District of Texas
United States Court of Appeals for the Fifth Circuit
United States Supreme Court

PROFESSIONAL AFFILIATIONS

State Bar College, Member
Tarrant County Bar Association, Member
International Municipal Lawyers Association, Member

EDUCATION

Doctor of Jurisprudence, 1986, University of Oklahoma School of Law
Bachelor of Arts, 1983, University of Oklahoma

CERTIFICATIONS

International Municipal Lawyers Association, Local Government Fellow

Denise wants to gratefully acknowledge Edwin P. Voss, Jr. of Brown & Hofmeister, L.L.P, for his contributions to the defensive theories presented in this article. This article had its genesis in their previous article, **The Latest in Litigation Regarding City Facilities** presented at the 2006 Suing and Defending Governmental Entities conference

TABLE OF CONTENTS

I. SCOPE OF THE PAPER 1

II. INTRODUCTION 1

III. PANOPLY OF DEFENSES 2
- A. Plaintiff lacks standing 2
- B. Plaintiff has no private right of action to enforce the transition plan and self-evaluation plan regulations 3
- C. The alteration was insufficient to trigger a duty to repair or replace the sidewalk 3
- D. Plaintiff requests fundamental alteration of the program 4
- E. Undue burden on the municipality 4
- F. The program is accessible when viewed in its entirety 4
- G. Sidewalks are not a "program" but are a "facility" 5
- H. Violations occurred prior to the applicable statute of limitations 5
- I. Repair prior to final decision moot claims 6
- J. Mere difficulty is insufficient to state a violation 6
- K. An interpretation that the ADA requires construction, maintenance and retrofitting of sidewalks is unconstitutional because it exceeds Congress' enforcement power under section 5 of the Fourteenth Amendment 7
- L. Other defenses 7
- M. Is it a defense if the accessibility modifications would threaten or destroy the historical significance of an historic propety? 7

IV. THE BEST DEFENSE IS A GOOD OFFENSE 8

V. CONCLUSION 8

TABLE OF AUTHORITIES

CASES

Ability Ctr. of Greater Toledo v. City of Sandusky, 385 F.3d 901, 914 (6th Cir. 2004) 3
385 F.3d at 911 5
Access Now, Inc. v. City of Miami (no opinion) 2
Access Now, Inc. v. Town of Jasper, No. 1:02-CV-059, 2004 U.S. Dist. LEXIS 905 (E.D. Tenn. Jan. 7, 2004) 6
Alford v. City of Cannon Beach,
No. CV-00-303-HU, 2000 U.S. Dist. LEXIS 20730, at *4 (D. Or. Jan. 17, 2000) 3, 7
Barden v. City of Sacramento, 292 F.3d 1073 (9th Cir. 2002), *cert. denied*, 539 U.S. 958 (2003) 2
292 F.3d at 1076 5
Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res., 532 U.S. 598, 603 (2001) 6
City of Boerne v. Flores, 521 U.S. 507 (1997) 7
521 U.S. at 520 7
Culvahouse v. City of LaPorte, 679 F. Supp. 2d 931 (N.D. Ind. 2009) 4
Deck v. City of Toledo, 56 F. Supp. 2d 886, 892 (N.D. Ohio 1999) 6
Dillery v. City of Sandusky, 398 F.3d 562, 568 (6th Cir. 2005) 3
Fradera v. Municipality of Mayaguez, 440 F.3d 17, 20 (1st Cir. 2006) 6
Frame v. City of Arlington, 575 F.3d 432 (5th Cir. 2009) 5
575 F.3d at 436 5
575 F.3d at 441 6
Hainze v. Richards, 207 F.3d 795 (5th Cir. 2000), *cert. denied*, 531 U.S. 959 (2000) 5
Iverson v. City of Boston, 452 F.3d 94 (1st Cir. 2006) 3, 5, 7
Jones v. City of Monroe, 341 F.3d 474 (6th Cir. 2003) 4
Kasten v. Port Auth., No. 98-CV-4988, 2002 U.S. Dist. LEXIS 17888 (E.D.N.Y. Sept. 10, 2002) 6
Kinney v. Yerusalim, 9 F.3d 1067, 1073 (3d Cir. 1993) 3
9 F.3d at 1069 4
9 F.3d at 1069 n.3 5
Lamb v. Charlotte County, 429 F. Supp. 2d 1302, 1311 (M.D. Fla. 2006) 3
Melton v. Dallas Area Rapid Transit, 391 F.3d 669 (5th Cir. 2004) 6
N.J. Prot. & Advocacy, Inc. v. Twp. of Riverside,
No. 04-5914, 2006 U.S. Dist. LEXIS 56478 (D.N.J. Aug. 2, 2006) 5
Parker v. Universidad de P.R., 225 F.3d 1 (1st Cir. 2000) 4
Reichenbach v. City of Columbus,
No. 2:03-CV-1132, 2006 U.S. Dist. LEXIS 57705 (S.D. Ohio, Aug. 16, 2006) 3
Reickenbacker v. Foster, 274 F.3d 974, 983 (5th Cir. 2001) 7
Rodriguez v. Investco, L.L.C., 305 F. Supp. 2d 1278, 1280-82 (M.D. Fla. 2004) 2
305 F. Supp. 2d at 1285 3
Rosen v. Montgomery County, 121 F.3d 154 (4th Cir. 1997) 5
Ross v. City of Gatlinburg, No. 03-5916, 113 F. App'x 113 (6th Cir. 2004) 3
Schonfeld v. City of Carlsbad, 978 F. Supp. 1329, 1339 (S.D. Cal. 1997) 5
Tennessee v. Lane, 541 U.S. 509, 531-32 (2004) 7
541 U.S. at 509 7
Tyler v. City of Manhattan, 118 F.3d 1400 (10th Cir. 1997) 3
Voices for Independence v. Pa. Dep't of Transp., No. 06-78, 2007 WL 2905887 (W.D. Pa. Sept. 28, 2007) 6
Young v. City of Claremore, 411 F. Supp. 2d 1295 (N.D. Okla. 2005) 7
Zimmerman v. Oregon Dep't of Justice, 170 F.3d 1169, 1174 (9th Cir. 1999) 5

STATUTES

42 U.S.C. §§ 12131-12134 (2009) 1
42 U.S.C. § 12132 (2009) 1
42 U.S.C. § 12146 (2009) 5
42 U.S.C. § 12205 (2009) 2
Elimination of Architectural Barriers Act, TEX. GOV'T CODE ANN., ch. 469 (Vernon 2004 & Supp. 2009-2010) .. 8

RULES

28 C.F.R. § 35.104 (2009) 5
28 C.F.R. § 35.105 (2009) 8
28 C.F.R. § 35.107(a) (2009) 8
28 C.F.R. § 35.107(b) (2009) 8
28 C.F.R. § 35.150 (2009) 6
28 C.F.R. § 35.150(a) (2009) 5
28 C.F.R. § 35.150(a)(1) (2009) 4, 7
28 C.F.R. § 35.150(a)(2) (2009) 7
28 C.F.R. § 35.150(a)(3) (2009) 4, 5
28 C.F.R. § 35.150(b) (2009) 7
28 C.F.R. § 35.150(b)(1) (2009) 4, 5
28 C.F.R. § 35.150(d) (2009) 3, 8
28 C.F.R. § 35.151 (2009) 3
Americans with Disabilities Act Accessibility Guidelines, 28 C.F.R. pt. 36, App. A (2009) 1
36 C.F.R. 1191 (2009) 3, 7
FED. R. CIV. P. 68(d) 6

OTHER AUTHORITIES

AB Data-Search, Texas Deparment of Licensing and Regulation, http://www.license.state.tx.us/ABDataSearch/ (last visited May 28, 2010) 2
ADA Notification Act of 2009, H.R. 2397, 111th Cong. (2009) 2
Adam A. Milani, *Wheelchair Users who Lack Standing, Another Procedural Threshold Blocking Enforcement of Titles II and III of the ADA*, 39 WAKE FOREST L. REV. 69 (2004) 3
U.S. Department of Justice, Civil Rights Division, Disability Rights Section, The ADA & City Governments: Common Problems, http://www.ada.gov/comprob.pdf (last visited May 28, 2010) 3
U.S. Department of Justice, Project Civic Access, http://www.ada.gov/civicac.htm (last visited May 28, 2010) 8

DEFENDING TITLE II: CITY SIDEWALK LITIGATION

I. SCOPE OF THE PAPER

On July 26, 1990, President George H. W. Bush signed into law the Americans with Disabilities Act ("ADA"). The intent of this historic legislation was to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities. The ADA supplemented and expanded the previous federal law that applies to persons with disabilities, the Rehabilitation Act. The ADA reflects our nation's faith and hope in the promise of all individuals and helps to ensure that our nation's opportunities are more accessible to all. While the ADA is designed to eliminate past effects of either accessibility problems or outright discrimination, recent litigation trends indicate a more aggressive approach to these issues vis-à-vis a city's facilities, an approach that was probably not considered or appreciated when the ADA was created. Numerous cities across the country are being sued regarding the condition of sidewalks in the public rights of way with the resultant enormous budgetary impact. Typically, the plaintiff alleges that the city has discriminated against him in violation of the ADA by failing to properly install and maintain curb ramps where sidewalks intersect with streets. They will further allege that many sidewalks contain abrupt vertical changes, excessive cross slopes, cracks and protruding objects that make travel dangerous for the mobility impaired. This paper will therefore touch upon this recent trend, and does not intend to be a comprehensive discussion of all aspects of ADA litigation.

II. INTRODUCTION

Deteriorating municipal infrastructure invites the challenge of Americans with Disabilities Act litigation over limited sidewalk access for the mobility impaired. 42 U.S.C. §§ 12131-12134 (2009). ADA regulations require all newly constructed or altered streets to include curb ramps at any intersection with barriers blocking entry to a sidewalk. 28 C.F.R. § 35.151 (2009). However, curb ramps and sidewalks installed in response to the original passage of Title II in 1990 may no longer meet current regulations, whether due to age, cracks or slopes that hinder wheelchair passage. Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities ("ADAAG"), 28 C.F.R. pt. 36, App. A (2009). Under Title II, no qualified individual with a disability shall be excluded from the benefits of the services, programs or activities of a public entity, or be subjected to discrimination by any such entity. 42 U.S.C. § 12132 (2009). To some attorneys, each cracked or broken sidewalk suggests a cause of action.

The U.S. Department of Justice enforces ADA requirements at the federal level. In Texas, the Texas Department of Licensing and Regulation (TDLR) enforces ADA as it relates to building design. Rather than use the federal design guidelines, Texas adopted its own version, the Texas Accessibility Standards (TAS). Construction or alteration projects costing more than $50,000 must have architectural plans submitted to TDLR prior to construction.[1] Smaller projects are still subject to the law but do not have to submit plans.

Two aspects of the ADA foster lawsuits against municipalities. First, the ADA's lack of a notice provision allows a plaintiff to file a lawsuit without first notifying the defendant of ADA violations. Prior bills—attempting to remedy such "see you in court" mentality—required a prospective plaintiff to provide a 90-day notice to defendant prior to filing a lawsuit for alleged ADA violations. However, to date, Congress cannot get over the hump.[2] Supporters of pre-suit notice believe that advance warning reasonably provides property owners the opportunity to remove alleged barriers before defending a lawsuit. Accessibility rights activists protest that the bill impedes the disabled public's access to the courts.

Second, the ADA's authorization for plaintiff's recovery of attorney's fees after a settlement *promotes* lawsuits. 42 U.S.C. § 12205 (2009). Since most cases settle before trial, defendants bear the cost of all legal fees, which may equal or exceed the cost of removing alleged barriers. After settling ADA litigation over sidewalks, Miami, Florida and Sacramento, California each paid hundreds of thousands of dollars for plaintiff's attorneys' fees.[3] One federal judge, after reviewing other cases, expressed his frustration at the distortion of the ADA into a "Cottage Industry" for lawyers. *Rodriguez v. Investco, L.L.C.*, 305 F. Supp. 2d 1278, 1280-82 (M.D. Fla. 2004) ("The current ADA lawsuit binge is . . . essentially driven by economics—that is, the economics of attorney's fees.").

III. PANOPLY OF DEFENSES

When your city receives a federal complaint regarding the condition of city sidewalks, numerous defenses are available:

A. Plaintiff lacks standing

Is the plaintiff an individual or an advocacy group? The first element of legal standing is injury

[1] The Texas Department of Licensing and Regulation maintains a searchable data base of all registered projects and whether they passed the TDLR accessibility inspection. AB Data-Search, Texas Deparment of Licensing and Regulation, http://www.license.state.tx.us/ABDataSearch/ (last visited May 28, 2010)

[2] ADA Notification Act of 2009, H.R. 2397, 111th Cong. (2009), is currently pending but would only amend Title III (public accommodations).

[3] Details regarding settlement for *Barden v. City of Sacramento*, 292 F.3d 1073 (9th Cir. 2002), *cert. denied*, 539 U.S. 958 (2003) ($745,000) can be viewed at: http://www.dralegal.org/downloads/cases/barden/settlement.pdf. Details regarding settlement for *Access Now, Inc. v. City of Miami* (no opinion), ($300,000) can be found at http://www.ci.miami.fl.us/Agendas/Commission/05-07-28.pdf

personal to the plaintiff. General claims, absent allegations of harm that is concrete and particularized, actual or imminent, should be dismissed. *Dillery v. City of Sandusky*, 398 F.3d 562, 568 (6th Cir. 2005); *Ross v. City of Gatlinburg*, No. 03-5916, 113 F. App'x 113 (6th Cir. 2004). General allegations of disparate impact on disabled persons, absent allegations of specific acts of intentional discrimination against plaintiffs, are insufficient. *Tyler v. City of Manhattan*, 118 F.3d 1400 (10th Cir. 1997). The plaintiff must identify a particular street, intersection, parking lot, or facility that impeded his access to a program and must indicate intent to return. *Id.; see also Rodriguez*, 305 F. Supp. 2d at 1285; Adam A. Milani, *Wheelchair Users who Lack Standing, Another Procedural Threshold Blocking Enforcement of Titles II and III of the ADA*, 39 WAKE FOREST L. REV. 69 (2004). If the advocacy group does not have a member in your city, they may lack associational standing. *Lamb v. Charlotte County*, 429 F. Supp. 2d 1302, 1311 (M.D. Fla. 2006).

B. Plaintiff has no private right of action to enforce the transition plan and self-evaluation plan regulations

Because they impose obligations beyond that which is imposed by the ADA statutory mandate, courts have declined allowing plaintiffs a private cause of action for violations of technical regulations. *See Iverson v. City of Boston*, 452 F.3d 94 (1st Cir.2006); *Ability Ctr. of Greater Toledo v. City of Sandusky*, 385 F.3d 901, 914 (6th Cir. 2004). This authority supports the argument that violations of the technical construction specifications of ADAAG are also not privately enforceable without a showing that denial of access to a program. *See also Alford v. City of Cannon Beach*, No. CV-00-303-HU, 2000 U.S. Dist. LEXIS 20730, at *4 (D. Or. Jan. 17, 2000) (No duty under the ADA to construct new sidewalks.)[4]

C. The alteration was insufficient to trigger a duty to repair or replace the sidewalk

Newly constructed or altered street level pedestrian walkways must contain curb ramps or other sloped areas at intersections or streets, roads, or highways. 28 C.F.R. § 35.151. Alterations must involve more than minor repairs or maintenance and "[a]t a minimum, it requires, the laying of a new asphalt bed spanning the length and width of a city block" to trigger a city's duty under this regulation.[5] *Kinney v. Yerusalim*, 9 F.3d 1067, 1073 (3d Cir. 1993). *See also Reichenbach v. City of Columbus*, No. 2:03-CV-1132, 2006 U.S. Dist. LEXIS 57705 (S.D. Ohio, Aug. 16, 2006). Routine maintenance, such as filling potholes, does not trigger curb ramp requirements. U.S. Department of Justice, Civil Rights Division,

[4] Also, for example, in 36 C.F.R. 1191 (2009) (Final Rule) the technical standards for the public rights-of-way are reserved.

[5] *Kinney v. Yerusalim*, 9 F.3d 1067, 1073 (3d Cir. 1993). *See also Reichenbach v. City of Columbus*, No. 2:03-CV-1132, 2006 U.S. Dist. LEXIS 57705 (S.D.Ohio, Aug. 16, 2006)

Disability Rights Section, The ADA & City Governments: Common Problems, http://www.ada.gov/comprob.pdf (last visited May 28, 2010).

D. Plaintiff requests fundamental alteration of the program

A city need not take action resulting in a fundamental alteration in the nature of its program. 28 C.F.R. § 35.150(a)(3) (2009). For example, a one-hour limit on downtown parking is facially neutral since it applies to all individuals, those with disabilities and those without. Similarly, the absence of free all-day parking within the immediate downtown area requires disabled and able-bodied persons to park further away. *Id.*; *see also Jones v. City of Monroe*, 341 F.3d 474 (6th Cir. 2003). However, where a city claimed that they currently provide no sidewalk construction and maintenance, the court did not accept that at face value. *Culvahouse v. City of LaPorte*, 679 F. Supp. 2d 931 (N.D. Ind. 2009).

E. Undue burden on the municipality

A city need not incur undue financial and administrative burdens. 28 C.F.R. § 35.150(a)(3) (2009). This determination is made by the head of the municipality or by its designee, including an accompanying written statement of the reasons for reaching that conclusion. *Id.* The "undue burden" determination is based on all resources available for use in the program, including the availability of federal funds. *Id.* When an alteration to existing improvements or new construction triggers the duty to install a curb ramp the "undue burden" defense does not apply. *Kinney v. Yerusalim*, 9 F.3d 1067, 1069 (3d Cir. 1993). A court will carefully limit the applicability of the "undue burden" defense to existing facilities and programs. *Id.* Courts have been unsympathetic to cities' budget concerns even when the sidewalk repair and maintenance budget would exceed the entire city's annual operating budget. *Culvahouse*, 679 F. Supp. 2d at 931.

F. The program is accessible when viewed in its entirety

Consistent with Title II's emphasis on "program accessibility," the regulatory scheme generally does not require public entities to retrofit all existing facilities. 28 C.F.R. § 35.150(a)(1) (2009). Rather, the regulations permit a public entity to select among a number of alternatives for accomplishing program accessibility, including relocation of services, reassignment of personnel and structural modification of existing facilities. *Id.* § 35.150(b)(1). For example, the First Circuit Court of Appeals held that a university was required to provide *at least one route* that a person in a wheelchair could use to reach the botanical garden safely. *Parker v. Universidad de P.R.*, 225 F.3d 1 (1st Cir. 2000). Thus, even if sidewalks are a "program," the ADA's program reasonable access requirement may be satisfied if some, but not all, routes are

accessible. *Schonfeld v. City of Carlsbad*, 978 F. Supp. 1329, 1339 (S.D. Cal. 1997).

G. Sidewalks are not a "program" but are a "facility"

Both the regulations and the First, Third and Sixth Circuits explicitly refer to walks and roadways as "facilities," rather than activities, programs, or services. *See* 28 C.F.R. § 35.104 (2009) (defining "facility" as "all or any portion of buildings, structures, . . . roads, walks, passageways, parking lots, or other real or personal property"); *Iverson v. City of Boston*, 452 F.3d 94 (1st Cir. 2006); *Ability Ctr. of Greater Toledo v. City of Sandusky*, 385 F.3d 901, 911 (6th Cir. 2004); *Kinney v. Yerusalim*, 9 F.3d 1067, 1069 n.3 (3d Cir. 1993) (noting that streets and walkways are "facilities" given particular priority in the regulations). The distinction between a facility and a program is important because it directs the city's obligation to guarantee accessibility. While entities may not exclude "qualified individual with disabilities from participation in or benefits of services, programs, or activities," the regulations do not "[n]ecessarily require a public entity to make each of its existing facilities accessible to and usable by individuals with disabilities." 28 C.F.R. § 35.150(a) & (a)(3) (2009); *N.J. Prot. & Advocacy, Inc. v. Twp. of Riverside*, No. 04-5914, 2006 U.S. Dist. LEXIS 56478 (D.N.J. Aug. 2, 2006). However, the Ninth and Fifth Circuit Court of Appeals have held that public sidewalks are subject to the program accessibility requirements of the ADA. *Barden v. City of Sacramento*, 292 F.3d 1073, 1076 (9th Cir. 2002); *Frame v. City of Arlington*, 575 F.3d 432 (5th Cir. 2009) (motion for en banc consideration pending). The focus of their inquiry was whether a particular public function is a normal function of a governmental entity. *Barden*, 292 F.3d at 1076; *Frame*, 575 F.3d at 432. This expansive view conflicts with previous decisions of the Fifth and Ninth Circuits. *Hainze v. Richards*, 207 F.3d 795 (5th Cir. 2000), *cert. denied*, 531 U.S. 959 (2000); *Zimmerman v. Oregon Dep't of Justice*, 170 F.3d 1169, 1174 (9th Cir. 1999); *Rosen v. Montgomery County*, 121 F.3d 154 (4th Cir. 1997). Certainly, it is a "normal function" of government to employ people and make arrests, yet these courts have held that those functions are not covered by Title II because they are not "programs," "services," or "activities." *Zimmerman*, 170 F.3d at 1174; *Hainze*, 207 F.3d at 795; *Rosen*, 121 F.3d at 154. This issue of whether sidewalks are a "program" is currently pending motion for rehearing *en banc* in the Fifth Circuit. *Frame*, 575 F.3d at 436.

H. Violations occurred prior to the applicable statute of limitations

Under Title II, there are two ways a city can violate the ADA: (1) deny access to a service, program or activity, or (2) commit an act of discrimination. It is an "act of discrimination" to construct new facilities that are inaccessible. *See, e.g.*, 42 U.S.C. § 12146

(2009); *Voices for Independence v. Pa. Dep't of Transp.*, No. 06-78, 2007 WL 2905887 (W.D. Pa. Sept. 28, 2007). Thus, the court should look to the date of construction to determine the date the "act of discrimination" occurred. *Deck v. City of Toledo*, 56 F. Supp. 2d 886, 892 (N.D. Ohio 1999); *see also Frame*, 575 F.3d at 441. If sidewalks are considered a "facility," the fact that disabled individuals still suffer the ramifications of having noncompliant ramps throughout the city does not create a present violation if the ramps were completely constructed and in plain view two years prior to the commencement of the lawsuit. *Deck*, 56 F. Supp. 2d at 892; *see also Frame*, 575 F.3d at 441. However, if sidewalks are a "program", some courts may consider the date the disabled person encounters the barrier as the relevant date for limitation purposes.

I. Repair prior to final decision moot claims

After a lawsuit is filed, get underway with an ADA compliance plan as quickly as possible (if you have not already). Consider making a comprehensive Rule 68 Offer of Judgment to shift the attorney fee burden.[6] Being underway with barrier removal provides several other potential defenses.

- There are no barriers to access.
- The city complies with the regulations regarding the removal of barriers.
- Even if the city has not yet completed the barrier removal plan, an injunction would not be appropriate where the defendant is affirmatively taking action.

If a defendant comes into compliance with the ADA during the pendency of the lawsuit, and prior to the court granting the plaintiff relief, the court loses subject matter jurisdiction based on mootness, and the plaintiffs will not be prevailing parties. *See Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 603 (2001); *see also Fradera v. Municipality of Mayaguez*, 440 F.3d 17, 20 (1st Cir. 2006).

J. Mere difficulty is insufficient to state a violation.

A parent and child sued an airport agency for failing to make terminals accessible to disabled people. Having a stroller for their disabled child made it very difficult for them to get into a busy elevator, and prevented them from using an escalator. Based on that experience, they alleged that the terminal was not readily accessible to disabled people. The court concluded that 28 C.F.R. § 35.150 governed the ADA claim and that no reasonable jury applying that regulation could conclude, on those facts, that the airport terminal failed to be readily accessible to the disabled. *Kasten v. Port Auth.*, No. 98-CV-4988, 2002 U.S. Dist. LEXIS 17888, (E.D.N.Y. Sept. 10, 2002); *see also Melton v. Dallas Area Rapid Transit*, 391 F.3d 669 (5th Cir. 2004).

[6] FED. R. CIV. P. 68(d). Occasionally cities are awarded attorney's fees in ADA litigation. *Access Now, Inc. v. Town of Jasper*, No. 1:02-CV-059, 2004 U.S. Dist. LEXIS 905 (E.D. Tenn. Jan. 7, 2004).

K. An interpretation that the ADA requires construction, maintenance and retrofitting of sidewalks is unconstitutional because it exceeds Congress' enforcement power under section 5 of the Fourteenth Amendment.

The authority of Congress to pass remedial legislation is limited. *See, e.g.*, *City of Boerne v. Flores*, 521 U.S. 507 (1997). Legislation that reaches beyond the scope of actual constitutional guarantees must exhibit "congruence and proportionality between the injury to be prevented or remedied and the means adapted to that end." *Id.* at 520. No support exists in the ADA for the expansive obligations some plaintiffs would impose on cities to have only wide, level, and unobstructed sidewalks and curb ramps. This has nothing to do with discrimination, but rather creates "an affirmative accommodation obligation on the part of public entities that far exceeds the constitutional boundaries." *Reickenbacker v. Foster*, 274 F.3d 974, 983 (5th Cir. 2001). Moreover, in *Tennessee v. Lane*, the Supreme Court held implicitly that the onerous provisions of Title II of the ADA were valid **only when** a deprivation of a fundamental right would result from a lack of accommodation, in that case, a right of access to judicial services. *Tennessee v. Lane*, 541 U.S. 509, 531-32 (2004). While use of public sidewalks and curb ramps is beneficial to all residents, there is no authority establishing this benefit as a fundamental right. *Flores*, 521 U.S. at 507; *see also Lane*, 541 U.S. at 509.

L. Other defenses

There are, of course, other defenses that may be applicable: 1) persons with disabilities are afforded an equally effective opportunity to participate in or benefit from a public entity's aids, benefits, and services through public transportation or other alternatives;[7] 2) there are no duties or regulations regarding this alleged violation;[8] 3) it is a threat to health and safety or would compromise the essential eligibility criteria for the program;[9] and 4) public entities are not required to retrofit all existing facilities;[10]

M. Is it a defense if the accessibility modifications would threaten or destroy the historical significance of an historic property?

Yes, but in Texas even historic buildings are expected to comply with the requirements for altered buildings to the fullest extent possible. If full compliance with the Texas Accessibility Standards would threaten or destroy the historic or architectural significance of the building, then alternative minimum requirements can still apply to that item or feature. Texas requires a letter from the Texas Historical

[7] 28 C.F.R. § 35.150(b) (2009); *Young v. City of Claremore*, 411 F. Supp. 2d 1295 (N.D. Okla. 2005) (The ADA reasonable modification claim requesting unlimited access to operate his golf cart on all roads at all times failed because the resident was not being deprived all access to transportation on the city's roads by reason of his disability, since he was able to operate an automobile.).

[8] *See Alford v. City of Cannon Beach*, No. CV-00-303-HU, 2000 U.S. Dist. LEXIS 20730, at *4 (D. Or. Jan. 17, 2000) (No duty under the ADA to construct new sidewalks.). Also, for example, in 36 C.F.R. 1191 (2009) (Final Rule) the technical standards for the public rights-of-way are reserved.

[9] *Young*, 411 F. Supp. 2d at 1295.

[10] 28 C.F.R. § 35.150 (a)(1) (2009); *Iverson*, 452 F.3d at 94 (Title II's emphasis is on "program accessibility,"); *see also Tennessee v. Lane*, 541 U.S. 509, 531-32 (2004).

Commission with a variance application. Other variances may be available from Texas Department of Licensing and Regulation if compliance is economically infeasible, generally considered to be more than twenty percent of the project cost. Variances are also possible if compliance is technically infeasible when, for example, structural members are in the way, or the space is not large enough to meet the requirements. Make alternative means of access (such as video presentations) available in an accessible area to inaccessible features of historic buildings. Elimination of Architectural Barriers Act, TEX. GOV'T CODE ANN., ch. 469 (Vernon 2004 & Supp. 2009-2010); *see also* 28 C.F.R. § 35.150 (a)(2) (2009).

IV. THE BEST DEFENSE IS A GOOD OFFENSE

The best way to protect your city from these litigation costs is to identify and redress compliance problems prior to litigation. Study Justice Department settlement agreements posted online to become familiar with the requirements. U.S. Department of Justice, Project Civic Access, http://www.ada.gov/civicac.htm (last visited May 28, 2010). Confirm that your city has an ADA coordinator who understands the need to coordinate the city's efforts to comply with and carry out the ADA mandates regarding program accessibility. 28 C.F.R. § 35.107(a) (2009). Third, ensure that your city established a grievance procedure for resolving complaints of violations of Title II. *Id.* § 35.107(b). Fourth, make sure that your city conducted a self-evaluation regarding programs, services and facilities. *Id.* § 35.105. Finally, verify the implementation of a transition plan and substantial compliance with the plan. *Id.* § 35.150(d).

V. CONCLUSION

Although no amount of risk prevention can completely eliminate the prospect of ADA litigation, the first step in prevention is to understand both your city's obligations under the ADA and the ADAAG proactively, as well as the existing accessibility issues. The intent of the ADA is to enable the disabled to participate in society without discrimination. Recent judicial attempts to increase the scope of the ADA vis-à-vis local governments indicate a growing trend in this area of litigation, one that many cities have experienced. This relatively new area of municipal litigation can lead to serious financial consequences. With the examples provided in this paper, hopefully you will not be caught off guard if this type of lawsuit arrives in your city.